



**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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In the Matter of )

VSNL Telecommunications (US) Inc. Petition for )  
Rulemaking )

Assessment and Collection of Regulatory Fees for )  
Fiscal Year 2006 )

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RM No. 11312

**COMMENTS IN SUPPORT OF  
PETITION FOR RULEMAKING**

Pursuant to the Public Notice released on February 15, 2006, in the above-referenced proceeding, Hibernia Atlantic files these comments in support of the petition for rulemaking filed by VSNL Telecommunications (US) Inc. (“VSNL”) on February 3, 2006 (“Petition for Rulemaking”). As set forth below and in the Petition for Rulemaking, the current regulatory fee system applicable to private submarine cable systems is badly broken, and the Commission must act expeditiously – either through the regular annual regulatory fee rulemaking proceeding or through the separate vehicle of the Petition for Rulemaking – to eliminate the resulting market distortions.

**I. BACKGROUND**

Hibernia Atlantic, a private company owned by Columbia Ventures Corporation, provides trans-Atlantic bandwidth through its Hibernia Atlantic (formerly 360atlantic) private

submarine cable system.<sup>1</sup> The Hibernia Atlantic system connects Dublin, Manchester, London, New York, Halifax, Montreal and Boston, and offers dedicated Ethernet and optical level service up to GigE and 10G wavelengths. Hibernia Atlantic’s customers for these products and services include international telecommunications companies, Internet service providers, content providers, global investment banks, Fortune 500 companies and government agencies.

As a private submarine cable operator, Hibernia Atlantic (or, in some cases, its customers) is subject to the Commission’s annual regulatory fees imposed upon international bearer circuits (“IBCs”). The Communications Act of 1934, as amended (the “Act”), authorizes the Commission to recover through the assessment of regulatory fees its costs related to enforcement activities, policy and rulemaking activities, user information services and international activities.<sup>2</sup> The Act requires that these fees are intended to be “reasonably related to the benefits provided” to the fee payors.<sup>3</sup> In establishing the level of regulatory fees, the Commission is directed to make “mandatory adjustment[s]” to reflect “unexpected increases or decreases in the number. . . of units subject to the payment of such fees.”<sup>4</sup> In addition, the Commission is permitted to make other adjustments “to reflect additions, deletions, or changes in

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<sup>1</sup> Hibernia Atlantic generically refers to and includes the following entities: Hibernia Atlantic U.S. LLC, Hibernia Atlantic Communications (Canada) Company, Hibernia Atlantic (UK) Limited, Columbia Ventures Acquisition (Cayman) Company and Hibernia Atlantic Cable Systems Limited.

<sup>2</sup> 47 U.S.C. § 159(a)(1).

<sup>3</sup> *Id.* § 159(b)(1)(A).

<sup>4</sup> *Id.* § 159(b)(2). These mandatory adjustments are not subject to judicial review.  
*Id.*

the nature of its services as a consequence of Commission rulemaking proceedings or changes in law.”<sup>5</sup>

Historically, the regulatory fees for IBCs have been based upon a specified dollar amount per active 64KB circuit or its equivalent.<sup>6</sup> After receiving Congressional direction regarding the total amount to be recovered through regulatory fees, the Commission annually establishes the precise dollar amount that must be collected from each sub-category of payors and then calculates a per-unit dollar figure to be paid. The IBC regulatory fees due in late 2005 were set at \$1.37 per active 64KB circuit or its equivalent.<sup>7</sup>

The submarine cable market has changed dramatically in the past five to ten years and the basis for calculating IBC regulatory fees has become woefully outdated.<sup>8</sup> Specifically, new technology has led to an explosion of submarine capacity, and Internet access and advanced services like streaming video require ever-increasing capacity. For example, the number of active 64K trans-oceanic circuits has risen from approximately 1,333,000 in 2000 to 3,100,000 in 2004.<sup>9</sup> Similarly, the total amount of available trans-oceanic capacity (again in 64K units) has increased from approximately 11,000,000 to 47,000,000 units in that same time period.<sup>10</sup>

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<sup>5</sup> *Id.* § 159(b)(3). These permitted adjustments are not subject to judicial review.  
*Id.*

<sup>6</sup> *Id.* § 159(g).

<sup>7</sup> Regulatory Fees Fact Sheet: What You Owe – International and Satellite Services Licensees for FY 2005, at 3 (July 2005).

<sup>8</sup> *See generally*, International Bureau, FCC, 2004 Section 43.82 Circuit Status Data Report (Dec. 2005) (“Circuit Status Report”).

<sup>9</sup> *Id.* at 33.

<sup>10</sup> *Id.*

At the same time, the prices for higher-capacity circuits have dropped much more steeply than the prices for lower-capacity circuits, with the result, for example, that an STM-4, which has four times the capacity of an STM-1, is typically priced at only twice the price of an STM-1. Typically, for every quadrupling of capacity, the price doubles. Therefore, even though an STM-64 circuit (10 Gbps) is carrying 64 times more capacity than an STM-1 circuit (155 Mbps), the price charged for the STM-64 circuit is only approximately eight times that of the STM-1. The regulatory fee for the higher capacity circuits, being capacity-based, thus increases much more quickly than the price, with the anomalous result that the regulatory fee becomes an increasing percentage of the price as a customer purchases higher-capacity circuits. For a very high-capacity circuit, the regulatory fee can equal or exceed the price of the capacity itself, thus effectively doubling the cost of the circuit.

As a result, this disproportionate IBC regulatory fee is negatively affecting purchase decisions for submarine cable capacity (as described in more detail below) and operates at cross-purposes with general U.S. international policy supporting the growth of the Internet.<sup>11</sup> In addition, the current system also operates at cross-purposes with recent international legislative and regulatory developments that have strengthened requirements for companies to protect data security. The disincentive to purchase high-capacity circuits created by excessive regulatory fees

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<sup>11</sup> See, e.g., David A. Gross, Deputy Ass't Secretary, U.S. Coordinator for International Communication and Information Policy, Remarks at the Communications Forum Luncheon at The Media Institute in Washington, DC (Apr. 6, 2002), *available at* <http://www.state.gov/e/eb/rls/rm/2002/9452.htm> (explaining that the State Department is dedicated to advocating international policies that encourage improved efficiency in the international information and communications technologies and telecommunications market through increased reliance on free-market forces; and specifically noting the State Department's pursuit of international policies supporting Internet growth).

hinder companies' implementation of international "back-ups" between US companies and overseas branches.

In recent years, various submarine cable providers (most notably Tyco) repeatedly have urged the Commission to address this market-distorting issue.<sup>12</sup> The latest effort is VSNL's Petition for Rulemaking that raises these issues yet again. Action is long overdue, and the Commission must seriously address the issues raised in the Petition for Rulemaking and revise the IBC regulatory fees to eliminate these market distortions and comply with its statutory mandate.

## **II. ARGUMENT**

The Commission must not allow the nascent revival of the undersea cable market to falter due to unfair regulatory burdens placed upon operators and service providers. The Commission should revise the fee schedule for these services to comply with its statutory mandate and to ensure that the fees take into account the explosive growth of submarine capacity. The magnitude and urgency of the problem require that prompt action be taken to reform the system, whether through the regular annual rulemaking regarding regulatory fees or through the separate vehicle of VSNL's Petition for Rulemaking.

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<sup>12</sup> See, e.g., Comments of Tyco Telecommunications (US) Inc., *Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, MD Dkt. No. 04-73 (filed Apr. 21, 2004); Reply Comments of FLAG Telecom Group Limited, *Assessment and Collection of Regulatory Fees for Fiscal Year 2004*, MD Dkt. No. 04-73 (filed Apr. 30, 2004); Comments of Tyco Telecommunications (US) Inc., *Assessment and Collection of Regulatory Fees for Fiscal Year 2005*, MD Dkt. No. 05-59 (filed Mar. 8, 2005) ("Tyco Reg Fee Comments 2005"); and Reply Comments of Level 3 Communications, LLC, *Assessment and Collection of Regulatory Fees for Fiscal Year 2005*, MD Dkt. No. 05-59 (filed Mar. 18, 2005).

**A. The Market Distortions Caused by IBC Regulatory Fees Discourage New Services and the Development of High-Capacity Data Networks.**

The market demand for high-capacity data circuits (multiple Gigabits as opposed to 64K voice channels) in recent years has increased dramatically,<sup>13</sup> but these circuits continue to be subjected to outdated IBC regulatory fees that are so high that they have distorted the submarine cable marketplace. This is a very real market problem that is discouraging the development of new and innovative services (such as international video-on-demand downloads) and the development of high-capacity data networks.

For example, if a cable operator sells an STM-4 instead of an STM-1, the capacity available to the customer – and accordingly the regulatory fee – quadruple, but under current market conditions that require volume discounts, the STM-4 is priced at only approximately twice as much as an STM-1. This mismatch is compounded in the case of STM-16 and STM-64 circuits. To put this another way, at the OC-3 level, the annual regulatory fee is equal to approximately one *month's* rent for the circuit, while at the 10G level, the annual regulatory fee is equal to approximately one *year's* rent for the circuit. As a result, for the very high-capacity circuits, the demand for which has been steadily increasing, the regulatory fee can equal or exceed the price of the capacity itself. For example, a 10G data circuit (an STM-64) on a trans-Atlantic route is currently priced as low as \$180,000 per year, yet is subject to a regulatory fee of \$190,000 – *i.e.*, the fee pass-through more than doubles the price of the circuit.

These disproportionately high fees on high-capacity circuits provide incentives for customers to delay upgrading their networks or instead purchase lower-capacity circuits to minimize the impact of the regulatory fee or to find ways to circumvent or avoid the regulatory

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<sup>13</sup> “More and more services continue to be placed on larger transmission units, such as STM-1 circuits rather than on 64 kbps circuits or E-1 circuits.” *See Circuit Status Report* at 3.

fee entirely. These buying decisions should be made based upon business needs and market-based pricing, and should not be the product of market distortions created by an unfair or irrational regulatory fee. Unfortunately for consumers, however, the current regulatory fee system discourages the sale and purchase of higher-capacity, more efficient circuits and thus discourages the development of high-capacity international data networks, discourages the growth of the Internet, and hinders the implementation of international data security measures.

**B. Submarine Regulatory Fees Far Exceed Their Intended Purposes and Must Be Revised.**

Regulatory fees collected from private submarine cable operators now far exceed their intended purposes. The Act allows the Commission to recover only the costs of its enforcement activities and policy and rulemaking activities related to the relevant payor category. In light of the significant deregulation and streamlining of submarine cables that has occurred in recent years,<sup>14</sup> the existing fee schedule for IBCs bears no resemblance to the statutory mandate. Commission action to correct this imbalance is long overdue, and the Commission should act promptly on the VSNL Petition for Rulemaking to implement reform.

VSNL, in its Petition for Rulemaking, proposes (among other things) a flat annual fee for each non-common carrier submarine cable system.<sup>15</sup> Hibernia Atlantic supports the Petition for Rulemaking because: (1) such a fee, so long as it is set at a level that eliminates the dramatic market distortions in the current fee system, would substantially rationalize the regulatory fee system for submarine cable operators; and (2) a per-system fee would be simpler to administer

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<sup>14</sup> See VSNL Petition for Rulemaking at 12-16; and Ex Parte Letter from K. Bressie, Counsel for Tyco Telecommunications (US) Inc. to D. Krech, International Bureau, FCC at 4-10 (dated Dec. 15, 2004) (“Tyco Ex Parte Letter”).

<sup>15</sup> VSNL Petition for Rulemaking at 8-9. See also Tyco Reg Fee Comments 2005 at 7-8.



than the current capacity-based approach and would adequately cover the Commission's administrative and enforcement costs. Hibernia Atlantic urges the Commission to open a rulemaking that proposes to adopt the approach set forth in VSNL's Petition for Rulemaking.<sup>16</sup>

**C. The Commission Has the Authority, and the Obligation, To Revise Its IBC Regulatory Fees To Eliminate the Current Market Distortions.**

As set forth above, the Act permits revisions to regulatory fees based upon Commission rulemaking proceedings or changes in the law,<sup>17</sup> but it *requires* adjustments in regulatory fees to account for “unexpected increases or decreases in the number of licensee or units subject to payment” to ensure that the regulatory fees paid by providers are reasonably related to their intended statutory purposes.<sup>18</sup>

There has been a dramatic increase in the amount of international submarine capacity in the marketplace. As set forth above, the number of active 64K trans-oceanic circuits has risen

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<sup>16</sup> Hibernia Atlantic is not opposed to the consideration of other reform proposals that might be placed in the record in this proceeding, however, so long as they help rationalize the regulatory fee structure and ending market distortions.

For example, if the Commission instead wanted to retain a capacity-based methodology for IBC regulatory fees, it could consider a “sliding-scale” approach that, unlike existing practice, does not increase the fee in direct proportion to the increase in capacity (because the price of the circuit does not increase in direct proportion to the capacity). This approach would diminish the disincentives customers to make their networks more efficient through the purchase of high-capacity circuits. This approach would require only a minor adjustment to the current regulatory fee schedule, merely adding multiple fee tiers to the current “per 64K circuit” methodology, but still requiring payment (albeit decreasing payment as units increase) per 64K circuit. To ensure that this regulatory fee does not distort the market for individual circuit purchases by customers, any such multi-tier fee schedule should apply on a “per circuit” basis, *i.e.*, to each circuit sold to a customer.

<sup>17</sup> See also Tyco Ex Parte Letter at 2-4.

<sup>18</sup> 47 U.S.C. § 159(b)(2)(A).

from approximately 1,333,000 in 2000 to 3,100,000 in 2004.<sup>19</sup> Similarly, the total amount of available trans-oceanic capacity (again in 64K units) has increased from approximately 11,000,000 to 47,000,000 units in that same period.<sup>20</sup> This dramatic increase falls squarely within the statutory “unexpected increase” in the number of units (*i.e.*, the number of 64K or equivalent circuits) that requires fee adjustment.

Significantly, these increases in capacity have neither increased the amount of regulation of these systems nor increased the benefit of the Commission’s activities to the submarine cable operators. Accordingly, the adjustments proposed by VSNL would more closely relate the IBC regulatory fees to the benefits provided to submarine cable operators by the Commission’s activities.

**D. The Dramatic Market Distortions Resulting From IBC Regulatory Fees Require the Commission to Act Quickly To Reform the System.**

The market distortions created by the present regulatory fee methodology applicable to submarine cables are significant and are hindering the development of high-capacity international data systems. In the past several years, other parties have brought these problems to the Commission’s attention,<sup>21</sup> but no meaningful reform has been accomplished. With the increasing adverse effects on the submarine cable market, the Commission should act quickly to reform the system and eliminate these market distortions. Although Hibernia Atlantic is neutral as to whether this reform occurs in the annual rulemaking proceeding regarding regulatory fees or in a separate rulemaking proceeding based upon the VSNL Petition for Rulemaking, this

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<sup>19</sup> See Circuit Status Report at 33.

<sup>20</sup> *Id.*

<sup>21</sup> See *supra* note 12.

reform must be completed soon in order to restore rationality to the submarine cable marketplace. Any further delay will continue to cause irreparable harm to the development of international high-capacity data networks.

### **III. CONCLUSION**

Accordingly, Hibernia Atlantic supports the VSNL Petition for Rulemaking and urges the Commission to act expeditiously to eliminate the dramatic market distortions created by the present regulatory fee methodology.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 16, 2006, a copy of the foregoing pleading was served by electronic mail upon the following parties:

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